NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SHULAMIT GLAUBACH; DAWN MERYDITH,

Plaintiffs - Appellants,

and

KRISTEN TSIATSIOS,

Plaintiff,

v.

REGENCE BLUESHIELD, a Washington corporation,

Defendant - Appellee.

No. 04-35013

D.C. No. CV-01-01221-RSL

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted July 14, 2005
Seattle, Washington

Before: TASHIMA, PAEZ, and CALLAHAN, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Plaintiffs Shulamit Glaubach (Glaubach) and Dawn Merydith (Merydith) appeal the district court's dismissal of their action against Regence BlueShield (Regence), a health care service contractor (HCSC) under Washington law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Because Blueshield argues that all of Merydith's claims are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 28 U.S.C. §§ 1001-1461, we address this issue first.[1] We then address the merits of the one state law claim that Plaintiffs raise on appeal.

1. ERISA Preemption[2]

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[1]ERISA preemption applies only to Merydith's claims because Merydith's health plan was employer-sponsored. *See Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998) (holding that a health plan sponsored by plaintiff's employer was an employee benefits plan under ERISA).

[2]Following removal from state court, Plaintiffs filed a First Amended Complaint alleging a claim for relief on behalf of Merydith under ERISA, 29 U.S.C. § 1132(a)(1)(B). With the addition of this claim, the district court acquired federal question jurisdiction under 28 U.S.C. § 1331. Because federal jurisdiction existed when the district court entered judgment, we need not address whether removal jurisdiction existed under 28 U.S.C. § 1441 on the ground that all of Merydith's state law claims were completely preempted by ERISA. *See Pegram v. Herdrich*, 530 U.S. 211, 216 n.2 (2000) (declining to address whether removal jurisdiction existed where no litigant objected to removal and amended complaint alleged ERISA violations, over which federal court jurisdiction existed); *see also Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932-33 (9th Cir. 1993) (same).

The district court determined that neither 29 U.S.C. § 1132(a) nor § 1144(a) preempted Merydith's claims under Washington Revised Code (Wash. Rev. Code) sections 48.30.300(1), 48.43.018(3) and 48.43.035(1). Whether ERISA preempts state law causes of action is a question we review de novo. *Cleghorn v. Blue Shield*, 408 F.3d 1222, 1225 (9th Cir. 2005).

Regence only challenges the district court's determination that Merydith's claims are not preempted by ERISA's civil enforcement remedy, 29 U.S.C. § 1132(a).[3] Even if a state law is saved from express preemption under § 1144(a) because it "regulates insurance," it can be preempted under § 1132(a). *Aetna Health Inc. v. Davila*, 542 U.S. 200, 216-17 (2004). Section 1132(a) states that a participant in an ERISA plan may bring a civil action "to recover benefits due to him *under the terms of his plan*, to enforce his rights *under the terms of the plan*, or to clarify his rights to future benefits *under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Davila*, 542 U.S. at 209.

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[3]Because Regence does not challenge the district court's ruling that 29 U.S.C. § 1144 does not preempt Merydith's state law claims, we have no need to address this part of the district court's preemption ruling.

By contrast, the Court noted that if the terms of a plan specifically exclude services from coverage, injuries caused by the refusal to cover those services would be "properly attributed to the terms of the plan itself, not the managed care entity that applied those terms." *Id*. at 213 n.3.

Here, Merydith's statutory claims do not challenge the denial of benefits provided under the terms of her policy. *Cf. Cleghorn*, 408 F.3d at 1225-26 (holding that claims were conflict preempted by § 1132(a) where plaintiff "sought benefits under the plan"). Nor does she assert any cause of action relating to claims processing. *Cf. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52, 56 (1987) (describing actions preempted by § 1132(a) as claims "asserting improper processing of a claim for benefits"); *see also Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1147 (9th Cir. 2003) (same). Instead, Merydith challenges the terms of her group health plan as contrary to Washington law. Because these claims do not seek recovery of benefits due under the terms of her plan, we agree with the district court that Merydith's statutory claims are not preempted.

2. Wash. Rev. Code section 48.30.300(1)

Plaintiffs appeal the district court's dismissal of their claims pursuant to Wash. Rev. Code section 48.30.300(1),[4] a provision in Washington's Insurance Code that prohibits certain unfair insurance practices. We review the district court's interpretation of Washington law de novo. *Rabkin v. Or. Health Sci. Univ.*, 350 F.3d 967, 970 (9th Cir. 2003).

The text of section 48.30.300(1)[5] supports the district court's ruling. Regence argues that because it is an HCSC and because, pursuant to section 48.44.020(1), HCSCs are not subject to Washington law relating to insurance, section 48.30.300(1) does not apply to it. As the district court reasoned, section 48.30.300(1) does not apply unless HCSCs are "in the business of insurance." Notably, however, an HCSC is defined as:

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[4]Plaintiffs do not challenge the district court's dismissal of their claims under Wash. Rev. Code sections 48.43.018(3) and 48.43.035(1) or Washington Administrative Code (WAC) 284-43-125 and 284-43-720(1). Similarly, Plaintiffs do not challenge the dismissal of their requests for declaratory and injunctive relief or the district court's determination that Merydith's breach of contract claim was preempted by ERISA. We also note that the ERISA claims in the First Amended Complaint were asserted alternatively on behalf of Merydith in the event that the district court were to reconsider its ERISA preemption ruling. We therefore do not address the district court's disposition of these claims.

[5]All further code references are to the Wash. Rev. Code unless otherwise indicated.

> any corporation, cooperative group, or association, which is sponsored by or otherwise intimately connected with a provider or group of providers, *who or which not otherwise being engaged in the insurance business*, accepts prepayment for health care services from or for the benefit of persons or groups of persons as consideration for providing such persons with any health care services.

§ 48.44.010(3) (emphasis added). Thus, HCSCs, like Regence, are not in the business of insurance.

Further, section 48.44.220 specifically prohibits the denial of coverage by HCSCs "on account of race, religion, national origin, or the presence of any sensory, mental, or physical handicap" but does not prevent HCSCs from denying coverage on account of gender. If section 48.30.300(1) applied to HCSCs, as Plaintiffs contend, section 48.44.220 would be redundant. Because "statutes should be construed so that all of the language used is given effect, and no part is rendered meaningless or superfluous," *State v. Bash*, 925 P.2d 978, 981 (Wash. 1996), the existence of section 48.44.220 supports the district court's conclusion that section 48.30.300(1) does not apply to HCSCs.

Washington caselaw also supports the district court's determination that section 48.30.300(1) does not apply to HCSCs. In *Leingang v. Pierce County Med. Bureau, Inc.*, the Washington Supreme Court held that HCSCs are governed by Wash. Rev. Code chapter 48.44 and the corresponding regulations contained in

WAC chapter 284-44, rather than the regulations contained in WAC chapter 284-30. 930 P.2d 288, 298 (Wash. 1997); *see also Ketcham v. King County Med. Serv. Corp.*, 502 P.2d 1197, 1199 (Wash. 1973) (stating that HCSCs "are regulated by the Health Care Service Act, RCW 48.44"); *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 98 P.3d 66, 70-71 (Wash. Ct. App. 2004) (holding that a provider agreement with an HCSC did not implicate the "business of insurance" and was therefore not subject to the laws relating to insurance pursuant to section 48.44.020(1)).

Plaintiffs argue that two regulations issued by the Washington Office of the Insurance Commissioner (OIC), WAC 284-43-720(1) (1998) and 284-43-822 (2002), support their argument that section 48.30.300(1) applies to HCSCs. We disagree.

WAC 284-43-720(1) provides that "[a]ll health carriers shall accept for enrollment any state resident within the carrier's service area and provide or assure the provision of all covered services regardless of . . . sex." The definition of "health carriers" in this regulation includes HCSCs. WAC 284-43-130. Yet Plaintiffs' argument is undermined by the Washington Supreme Court's interpretation of the phrase "provide or assure the provision of all covered services" in WAC 48.43.018(3) and 48.43.035(1). *Glaubach v. Regence Blueshield*, 74 P.3d 115, 117 (Wash. 2003). There, the Washington Supreme

Court was asked by the district court as part of these proceedings to determine whether these two state health care related statutes (48.43.018(3) and 48.43.035(1)) require coverage of prescriptive contraceptives. *Id.* at 115-16. The Washington Supreme Court "answer[ed] the . . . question in the negative[,]" *id.* at 119, concluding that "covered services" referred to "more specific services offered as a part of [a] health plan, rather than [the] broad category" of "prescription drugs." *Id.* at 118. Applying the Washington Supreme Court's determination in *Glaubach*, we conclude that WAC 284-43-720(1) does not require HCSCs, like Regence, that provide a general prescription benefit, to cover all FDA-approved contraceptives.

Next, plaintiffs argue that WAC 284-43-822 (2002) and its regulatory history confirm that section 48.30.300(1) applied to HCSCs before the promulgation of this regulation. *See* Wash. St. Reg. 01-15-084 (July 18, 2001) (OIC Proposed Rules). In response, Regence reasons that if HCSCs were already prohibited from discriminating on the basis of gender by section 48.30.300(1), the new regulation would not have been necessary.

As authority for the new rule, Plaintiffs stress that the OIC cited section 48.30.300 and specifically referenced this section in its commentary. *See id.* This section, however, is one of thirty-one statutes listed as authority for promulgating WAC 284-43-822. *See* WAC 284-43-822, note. Also, the new rule is not limited

to HCSCs, as WAC 284-43-130(14) defines "health carrier" to include "a disability insurance company" and a "health maintenance organization" as well. As the Washington Supreme Court noted in *Glaubach*,

> this rule [WAC 284-43-822] must be seen against the backdrop of the broader law. A preexisting regulation already forbade sex discrimination in insurance plans. WAC 284-43-720(1). Also, a federal trial court had recently held that federal law requires health carriers to cover prescription contraception. *Erickson* [*v. Bartell Drug Co.*], 141 F.Supp. 2d 1266 [(W.D. Wash. 2001)]. Other sources of authority undergird this regulation.

74 P.3d at 119.

Against this "backdrop of the broader law," the court rejected Plaintiffs' argument that WAC 284-43-822 "is persuasive authority that [sections 48.43.018 and 48.43.035] require contraceptive coverage." *Id.* at 118. In so doing, the court noted that "the administrative history does not dwell on section .018, instead it focuses on the underlying availability of and need for contraception." *Id*. Thus, the court concluded that "we are unconvinced that WAC 284-43-88 is an interpretation of RCW 48.43.018 and RCW 48.43.035." *Id*.

We arrive at a similar conclusion here. Although the OIC cites section 48.30.300(1) as one of the authorities for WAC 284-43-88, we decline to construe the new regulation as an authoritative interpretation of section 48.30.300(1). In light of the limitation in section 48.30.300(1), the definitional clause in section

48.44.220, the Washington Supreme Court's ruling in *Glaubach, Leingang*, and the court of appeals' decision in *Kruger*, we are not persuaded that the district court erred in dismissing Plaintiffs' claim under section 48.30.300(1).[6]

AFFIRMED.

[6]Plaintiffs argue for the first time on appeal that the district court's conclusion that section 48.30.300(1) does not apply to HCSCs would violate Washington's Equal Rights Amendment, Washington Constitution, Article XXXI, § 1. We do not generally consider issues raised for the first time on appeal and therefore deem this argument waived. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).